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No. 01-309

Supreme Court, U.S.
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In The

Supreme Court of the United States

LARRY HOPE,

Petitioner,

v.

MARK PELZER, GENE MCCLARAN, and JIM GATES a/k/a KEITH GATES,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether state officials sued in their individual capacities under 42 U.S.C. § 1983 are entitled to qualified immunity unless they have violated statutory or constitutional rights "clearly established" by a case presenting facts "materially similar" to those in the plaintiff's case.

2. Whether under the circumstances that must be taken as true at the summary judgment stage of this case, tying a prisoner to a "hitching post" violates "clearly established" constitutional rights for purposes of qualified immunity under 42 U.S.C. § 1983.

PARTIES TO THE PROCEEDING BELOW

The Petitioner, Larry Hope, is an individual who was the plaintiff in the district court and the appellant in the court of appeals. The Respondents, Mark Pelzer, Gene McClaran, and Jim Gates a/k/a Keith Gates, are all individuals who were the defendants in the district court and the appellees in the court of appeals.

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The decision of the court of appeals is reported at 240 F.3d 975 (11th Cir. 2001). The decision of the district court is unreported. *See* Supp. Pet. App. 1-5.

JURISDICTION

The court of appeals entered its judgment on February 2, 2001. Pet. App. 15. A petition for rehearing was timely filed on February 22, 2001. App. 4; *see* 11th Cir. R. 40-3. The petition was denied on May 7, 2001. Pet. App. 16-17. The petition for writ of certiorari was filed on July 28, 2001, and granted on January 4, 2002. The order granting the petition was amended on January 29, 2002. Jurisdiction in this Court rests on 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment VIII of the United States Constitution provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S. CONST. amend. VIII.

STATEMENT OF THE CASE

Larry Hope, the petitioner, was an Alabama inmate who was subjected to a painful and degrading form of corporal punishment – he was handcuffed in an awkward position to a "hitching post" for hours in the hot sun.[1] The court of appeals ruled that Hope's punishment violated the Eighth Amendment; however, the court also ruled that the respondent prison guards were entitled to qualified immunity because the facts in prior Eighth Amendment cases were not, according to the court, "'materially similar'" to the facts in Hope's case. Pet. App. 13 (citation omitted).

"Hitching posts" were horizontal metal bars to which inmates accused of certain forms of misconduct were handcuffed in Alabama prisons prior to mid-1998.[2] According to an Alabama Department of Corrections regulation in effect during the time period relevant to this case, the hitching post was intended to be used as a coercive device to compel recalcitrant inmates to work. App. 102-05; *Austin*, 15 F. Supp. 2d at 1240-43; Op. Cert. 1.

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[1] In ruling on qualified immunity, the facts must be "[t]aken as true in the light most favorable to the party asserting the injury." *Saucier v. Katz*, 121 S.Ct. 2151, 2156 (2001). The description of the facts presented here is drawn principally from the petitioner's affidavits and the lower courts' distillations of the record.

[2] Alabama corrections officials stopped using the hitching post after the court in *Austin v. Hopper*, 15 F. Supp. 2d 1210, 1274 (M.D.Ala. 1998), declared that the manner in which the post had been used violated the Eighth Amendment. At the time of the *Austin* case, Alabama was the only state in the nation that used a device like the hitching post. *See id.* at 1250.

Inmates who refused to work or disrupted their work squads were to be hitched to the posts, and such inmates were to be released as soon as they agreed to go to work. App. 102-03; Op. Cert. 1. In practice, "the procedures set out [in the regulation] for determining whether to place an inmate on the hitching post were not followed." *Austin*, 15 F. Supp. 2d at 1243. Some inmates who had not refused to work or been disruptive – including inmates who "were not physically capable of working" – were handcuffed to the posts, and "inmates were not permitted to leave the hitching post after they had informed the officers that they were willing to work." *Id.* at 1243, 1245.

Hope was one of the inmates who was handcuffed to the hitching post to punish him, rather than to coerce him to return to work. In 1995, Hope was assigned to Alabama's newly-formed "chain gang" at the Limestone Correctional Facility.[3] On May 11 of that year, another inmate started an argument with Hope while they were working near an interstate highway. App. 44. Despite the fact that Hope "had neither refused to work nor encouraged other inmates not to work," *id.*, a respondent officer ordered him sent back to Limestone and placed on the hitching post. App. 9, 24. Another respondent officer handcuffed him to the post. App. 45.

Because Hope is "just slightly taller than the hitching post itself, [his] arms grew tired from being handcuffed

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[3] Despite the fact that chain gangs had had "a long, sordid history in the State of Alabama," state officials revived the practice of chaining inmates together on work squads in 1995. *Austin*, 15 F. Supp. 2d at 1215-16. After a court challenge, the state abandoned the practice the following year. *Id.* at 1217.

so high." App. 45. When he "tried moving to improve [his] circulation, the handcuffs would cut into [his] wrists and cause great pain and discomfort." *Id.* A respondent officer finally released Hope after two hours because a prison captain determined that the argument had not been Hope's fault. *Id.* at 35, 45. No hearing or disciplinary proceeding of any kind had been held before Hope was handcuffed to the hitching post in the first place.

On June 7, 1995, Hope had an altercation with guards at the work site at approximately 10:30 a.m.[4] He was placed in leg irons and transported back to the prison. App. 16-17. After being examined in the prison infirmary at approximately 11:30 a.m., Hope was handcuffed to the hitching post by one of the respondent officers. App. 46. Hope had not "refused to work or encouraged other inmates to refuse to work." Pet. App. 9. He also had not been given any kind of disciplinary hearing. App. 48.

This time, Hope was left on the hitching post for seven hours. App. 47. The officers at the post made him take off his shirt because one of them wanted to use it to clean off a van, App. 10, so Hope "remained shirtless all day while the sun beamed down and burned [his] skin." *Id.* He was deprived of water and taunted. *Id.* at 47.[5] He tried to move his arms to improve his circulation and

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[4] According to Hope, the altercation "was started by a correctional officer who had cursed [him] and grabbed [him] by the neck because [he] was sleeping on the bus on the way to a work site." App. 46.

[5] "At one time, prison guards brought a cooler of water near [Hope], let the prison dogs drink the water, and then kicked the cooler over at Hope's feet." Pet. App. 6; *see* App. 11.

relieve his pain, but the attempt "caused the cuffs to cut into [him]. By the time [he] got off the rail" after seven hours, his "wrists were swollen and bruised." *Id.* at 10.[6]

Although the respondents claimed in the court below that Hope would have been released from the post had he agreed to go to work, *see* Pet. App. 9, nothing in the record supports this claim, and the court drew the opposite inference.

> While the [Alabama Department of Corrections] claims that Hope would have been released from the hitching post had he asked to return to work, the evidence suggests that is not the case. First, Hope never refused to work. . . . Second, Hope was placed in a car and driven back to Limestone to be cuffed to the hitching post on both occasions. Given the facts, it is improbable that had Hope said, "I want to go back to work," a prison guard would have left his post at Limestone to drive Hope back to the work site. It is more likely that the guards left Hope on the post until his work detail returned to teach the other inmates a lesson.

Id. at 9-10.[7]

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[6] Hope's description of his injuries was consistent with that of other inmates who testified, along with him, in the *Austin* case. *See Austin*, 15 F. Supp. 2d at 1248. The *Austin* court found that "inmates placed upon the hitching post suffered 'extreme pain, anguish, humiliation, mental suffering, and resulting physical soreness and depression.' " *Id.* at 1256 (citation omitted).

[7] This inference is consistent with the *Austin* court's finding that inmates were not taken off the hitching post even when they expressed a willingness to work. *See Austin*, 15 F. Supp. 2d at 1245.

Hope filed a *pro se* suit for damages on March 26, 1996, alleging that his Eighth Amendment rights had been violated. App. 5-11. The case was assigned to a magistrate judge who issued a report recommending that the case be dismissed on qualified immunity grounds. Supp. Pet. App. 6-33. Hope objected; however, the district court adopted the magistrate's report and accepted his recommendation. *Id.* at 1-5.

On appeal, the Eleventh Circuit held that "the policy and practice of cuffing an inmate to a hitching post or similar stationary object for a period of time that surpasses that necessary to quell a threat or restore order is a violation of the Eighth Amendment." Pet. App. 11. Hope, the court ruled, easily demonstrated that the defendants' actions were wanton, thus satisfying the subjective component of the Eighth Amendment inquiry. *See Wilson v. Seiter*, 501 U.S. 294, 302 (1991). Indeed, the court found that there was "uncontested evidence of deliberate indifference" to the obvious risks of harm to Hope's health. Pet. App. 6. To buttress this conclusion, the court pointed out that the United States Department of Justice had conducted an investigation and advised Alabama officials that the hitching post posed "health and safety risks" and was being used improperly for corporal punishment purposes in Alabama prisons. Pet. App. 6-7.

The court also ruled that Hope demonstrated that he had been "denied basic human necessities" and subjected to unnecessary pain, thereby satisfying the objective component of the Eighth Amendment inquiry. Pet. App. 8; *Wilson*, 501 U.S. at 303. In reaching this conclusion, the court relied heavily upon its prior decision in *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974):

> Since abolishing the pillory over a century ago, our system of justice has consistently moved away from forms of punishment similar to hitching posts in prisons. In *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974), in regard to "handcuffing inmates to the fence and to cells for long periods of time" and other such punishments, we stated that "[w]e have no difficulty in reaching the conclusion that these forms of corporal punishment run afoul of the Eighth Amendment, offend contemporary concepts of decency, human dignity, and precepts of civilization which we profess to possess." *Gates*, 501 F.2d at 1306.

Pet. App. 8.

Despite its decision in *Gates* and its recognition that society had moved away from "forms of punishment similar to hitching posts," the court ruled that the defendants were entitled to qualified immunity. The court's reasoning is contained in the following paragraph:

> Hope argues that several of our cases, including *Gates* and *Ort [v. White*, 813 F.2d 318 (11th Cir. 1987)], established a bright-line rule against use of the hitching post. While we recognize that the inappropriateness of the hitching post could be inferred from these opinions, a bright-line rule for qualified immunity purposes "is not to be found in abstractions – to act reasonably, to act with probable cause, and so forth – but in studying how these abstractions have been applied in concrete circumstances." *Lassiter v. Alabama A&M Univ. Bd. of Tr.*, 28 F.3d 1146, 1150 (11th Cir. 1994) (citations omitted). It is important to analyze the facts in these cases, and determine if they are "materially similar" to

the facts in the case in front of us. *Suissa v. Fulton County, Ga.*, 74 F.3d 266, 269-70 (11th Cir. 1996) (per curiam) (citations omitted). Though analogous, the facts in *Gates* and *Ort* are not "materially similar" to Hope's situation. In *Ort* the defendant was refused water while at a work site, until he agreed to do his job of carrying water to the work site. *Ort*, 813 F.2d at 326. *Gates* was an even more distinct case, as it involved an effort to make substantial changes based on the unconstitutional "conditions and practices in the maintenance, operation and administration" of a prison. *Gates*, 501 F.2d at 1295. We do not find that language in *Gates*, *Ort*, or any other Eleventh Circuit or Supreme Court opinion established that impermissible use of the hitching post constitutes cruel and unusual punishment clearly enough that "a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039 (1987).

Pet. App. 12-13.

SUMMARY OF ARGUMENT

The government officials involved in handcuffing the petitioner to the hitching post were not entitled to qualified immunity. The Eleventh Circuit's "materially similar facts" standard that shielded them from liability imposes an unnecessarily heavy burden on plaintiffs. To demonstrate that a government official violated "clearly established" law and is not entitled to immunity, a plaintiff must show that the rights at stake were sufficiently

"apparent" or "obvious" to give the official "fair warning" of what the law required. *See United States v. Lanier*, 520 U.S. 259, 270 (1997); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Pointing to a prior case with "materially similar facts" is one way, but not the only way, to make such a showing. Just as the Court rejected a "fundamentally similar facts" requirement in *Lanier*, so it should reject the "materially similar facts" requirement here.

No reasonable officer could have believed in 1995 that it was lawful to punish an inmate by leaving him handcuffed to a hitching post. The punishment was strikingly similar to punishment on a pillory – a barbaric practice long understood to be unconstitutional. *See, e.g., Weems v. United States*, 217 U.S. 349, 377-78 (1920). The court below should have recognized not only that the post was a modern form of the pillory; it should have recognized that handcuffing an inmate to a post as a form of punishment was no different than handcuffing an inmate to a fence, a form of corporal punishment outlawed in *Gates v. Collier*, 501 F.2d 1251, 1306 (5th Cir. 1974). Instruments of corporal punishment like the hitching post that are used to inflict "unnecessary and wanton" pain have no place in a civilized society. *See Wilson v. Seiter*, 501 U.S. 294, 297 (1991). The fact that no other state used a device like the hitching post should have been a sign to Alabama officials that the practice was wrong. *Cf. Harmelin v. Michigan*, 501 U.S. 957, 976 (1991) (Eighth Amendment prohibits "cruel methods of punishment that are not regularly and customarily employed").

ARGUMENT

I. TO OVERCOME QUALIFIED IMMUNITY, A PLAINTIFF NEED NOT POINT TO A PRIOR CASE PRESENTING "MATERIALLY SIMILAR" FACTS

The doctrine of qualified immunity protects public officials from monetary liability when their conduct does not violate "clearly established" law. To overcome the defense of qualified immunity – to demonstrate that the law is "clearly established" – a plaintiff must show that the officials had fair warning of what the law required. One way to show fair warning is by pointing to a prior case with similar facts, but that is not the only way to do so. In some instances, a constitutional violation will be so apparent or obvious that a reasonable official should know of the unconstitutionality of his or her conduct even if the facts at issue are quite dissimilar to those in prior cases. *See, e.g., United States v. Lanier*, 520 U.S. 259, 271 (1997) (recognizing that a general constitutional rule may apply with "obvious clarity to the specific conduct in question," even though the challenged conduct has not previously been held unlawful). Because the Eleventh Circuit here required the plaintiff to identify a prior case presenting "materially similar facts" – a judicial gloss on the qualified immunity inquiry rejected by this Court in *Lanier* – the decision below cannot stand.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court recognized that a suit for damages may be the only practical way to vindicate constitutional guarantees. *Id.* at 814. But the Court also recognized that permitting damage actions against government officials can entail substantial social costs, including the risk that officials will

be inhibited in the discharge of their duties by a fear of personal monetary liability and harassing litigation. *Id.* The Court has "accommodated these conflicting concerns by generally providing government officials performing discretionary functions with a qualified immunity, shielding them from civil damage liability, as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

There are two steps to the qualified immunity inquiry. A court must first determine whether the facts alleged, taken in the light most favorable to the plaintiff, show that the government official's conduct violated a constitutional right. If a violation can be made out, the court must then ask whether the right was clearly established. *See Saucier v. Katz*, 121 S.Ct. 2151, 2156 (2001). Because the concern of the qualified immunity inquiry is to protect officials from liability for reasonable mistakes, the touchstone of the defense is whether officials have been given fair warning as to what the law requires. *See, e.g., id.* ("The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."); *United States v. Lanier*, 520 U.S. at 270 ("the object of the 'clearly established' immunity standard is not different from that of 'fair warning' "); *Anderson v. Creighton*, 483 U.S. at 640 ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.").

The Court has expressed concern on a number of occasions about the power of general statements of law to

provide fair warning to public officials. As a result, it has emphasized the importance of identifying the legal rules at issue with particularity. *See id.* at 640. But at the same time, the Court has warned against requiring too "extreme [a] level of factual specificity." *See Lanier*, 520 U.S. at 268. In *Lanier*, for example, a unanimous Court recognized that "general statements of the law are not inherently incapable of giving fair and clear warning." *Lanier, id.* at 271; *cf. Saucier*, 121 S.Ct. at 2157 ("This is not to say that the formulation of a general rule is beside the point, nor is it to insist the courts must have agreed upon the precise formulation of the standard."). The Court made a similar point in *Anderson*, when it noted that official action is not automatically protected by qualified immunity simply because "the very action in question has [not] previously been held unlawful." *Anderson*, 483 U.S. at 640; *see also Mitchell v. Forsyth*, 472 U.S. 511, 535 n.12 (1985) ("We do not intend to suggest that an official is always immune from liability or suit for a warrantless search merely because the warrant requirement has never explicitly been held to apply to a search conducted in identical circumstances."). All that is required is that "in the light of pre-existing law the unlawfulness must be apparent." *Anderson*, 483 U.S. at 640.

In *Lanier*, the Court unanimously rejected a gloss on the "clearly established" standard that is equivalent to the "materially similar facts" requirement that the Eleventh Circuit imposed in this case. *Lanier* involved a challenge to a state court judge's conviction under 18 U.S.C. § 242 – a civil rights statute prohibiting the deprivation of constitutional rights under color of law – for the sexual assault of five women. 520 U.S. at 261-62. The Sixth

Circuit had reversed the conviction because § 242 had never previously been held to apply to sexual assaults. According to the Sixth Circuit, criminal liability could be imposed only if the constitutional right said to have been violated had been held to apply in "a factual situation fundamentally similar to the one at bar." *Id.* at 263 (quoting *Lanier v. United States*, 73 F.3d 1380, 1393 (6th Cir. 1996)).

This Court soundly rejected the Sixth Circuit's "fundamentally similar facts" requirement. The Court acknowledged that § 242 did not "delineate the range of forbidden conduct with particularity." *Lanier*, 520 U.S. at 265. But the Court ruled that liability could still be imposed as long as the person charged had "fair warning" of what the law requires. *Id.* at 268. Although *Lanier* arose in the criminal sphere, the Court analogized the fair warning requirement to the "clearly established law" test of qualified immunity: "[T]he qualified immunity test is simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes." *Id.* at 270-71.

The Sixth Circuit's "fundamentally similar facts" requirement, the Court reasoned, added an unwarranted judicial gloss to the fair warning standard. *Id.* at 268. The Court noted that it had previously upheld convictions under § 242 "despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *Id.* at 269. "[G]eneral statements of the

law," the Court explained, "are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question." *Id.* at 271. The Sixth Circuit's standard, according to the Court, created the danger that "trial judges [would] demand a degree of certainty at once unnecessarily high and likely to beget much wrangling." *Id.* at 270.

The Eleventh Circuit's "materially similar facts" standard creates the same danger. The court below ruled that "cuffing an inmate to a hitching post past the time when he constitutes a threat to himself or others violates the 'broad and idealistic concepts of dignity, civilized standards, humanity and decency' embodied in the Eighth Amendment." Pet. App. 8 (citation omitted). As precedent for this ruling, the court pointed to its own prior decision in *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974), where it had used almost identical language: "handcuffing inmates to the fence and to cells for long periods of time. . . run[s] afoul of the Eighth Amendment, [and] offend[s] contemporary concepts of decency, human dignity, and precepts of civilization which we profess to possess." *Id.* at 1306.[8] Despite the similarity between *Gates* and this case, the court below ruled that *Gates* did not "clearly establish the law" for qualified immunity purposes. Pet. App. 13 ("Though analogous, the facts in

[8] The Eleventh Circuit considers decisions by the former Fifth Circuit to be binding authority. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

Gates . . . are not "materially similar" to Hope's situation.").

Like the Sixth Circuit standard rejected in *Lanier*, the Eleventh Circuit's "materially similar facts" requirement simply goes too far. The court below elevated the requirement to one of independent constitutional significance, putting the same impermissible gloss upon the "fair warning" standard that the Court rejected in *Lanier*. Rather than serving the purpose of ensuring that officials are given fair warning before being subjected to monetary liability, the Eleventh Circuit's standard turns the qualified immunity analysis into an exercise in which courts simply make factual comparisons between cases.[9]

Qualified immunity was never intended to relieve government officials from the responsibility of exercising judgment or from applying familiar legal principles to new situations. Nor should it function to give officials "one free violation" of constitutional rights every time they are asked to apply a well-established principle to a new set of facts. *See Wilson v. Seiter*, 526 U.S. at 625 (Stevens, J., concurring in part and dissenting in part). If it did, abusive prison officials could avoid liability for torturing inmates simply by varying their methods each time they were caught.

"[I]n many instances 'the absence of a reported case with similar facts demonstrates nothing more than widespread compliance with' the well-recognized applications

[9] For the Eleventh Circuit, "minor variations in some facts" are often quite important. *See Marsh v. Butler County*, 268 F.3d 1014, 1032 (11th Cir. 2001).

of the right at issue on the part of government actors." *Johnson v. Newburgh Enlarged School District*, 239 F.3d 246, 251 (2d Cir. 2001) (citation omitted). As the Court put it in *Lanier*, " 'the easiest cases don't even arise.' " 520 U.S. at 271 (citation omitted).

Other circuit courts have recognized that plaintiffs need not identify a closely analogous case on the facts to overcome qualified immunity; they have found it enough that the alleged constitutional violation was sufficiently obvious or clear that a reasonable official would have known of the unconstitutionality of the conduct at issue. *See, e.g., Amaechi v. West*, 237 F.3d 356, 362-63 (4th Cir. 2001) ("clearly established" rights "include[ ] not only already specifically adjudicated rights, but those manifestly included within more general applications of the core constitutional principle invoked"); *Brokaw v. Mercer County*, 235 F.3d 1000, 1022 (7th Cir. 2000) ("[A] plaintiff need not always identify a closely analogous case; rather, he can establish a clearly established constitutional right by showing that the violation was so obvious that a reasonable person would have known of the unconstitutionality of the conduct at issue. Thus, binding precedent is not necessary to clearly establish a right."); *Murrell v. School Dist. No. 1*, 186 F.3d 1238, 1251 (l0th Cir. 1999) ("We have never said that there must be a case presenting the exact fact situation at hand in order to give parties notice of what constitutes actionable conduct. Rather, we require parties to make reasonable applications of the prevailing law to their own circumstances."); *Pierce v. Smith*, 117 F.3d 866, 882 (5th Cir. 1997) ("[T]he egregiousness and outrageousness of certain conduct may suffice to obviously

locate it within the areas proscribed by a more general constitutional rule.").

The "materially similar facts" requirement is especially inappropriate here given the level of specificity of the constitutional right at issue. The court below recognized that "the inappropriateness of the hitching post could be inferred from [its prior] opinions," but stated that "a bright line rule for qualified immunity purposes 'is not to be found in abstractions – to act reasonably, to act with probable cause, and so forth – but in studying how these abstractions have been applied in concrete circumstances.' " Pet. App. at 12 (citation omitted). But the problem here is with the "and so forth." The right at issue in this case – the right to be free of prolonged physical restraints used as a form of punishment – is far more specific than the requirement "to act reasonably" or "to act with probable cause." And it is far more specific than the legal standard at issue in *Lanier*. *See Lanier*, 520 U.S. at 264 (holding that statute prohibiting deprivation under color of law of "rights protected by the Constitution or laws of the United States" gave fair warning).

Of course, a requirement of "materially similar facts" might not skew the qualified immunity inquiry if the requirement were interpreted with appropriate flexibility. If courts recognize that, in some instances, factual differences between cases – no matter how numerous – may not be "material," imposing a requirement of "materially similar facts" might have few consequences. But if courts tend to interpret the requirement as calling for a certain minimum quantum of "similar facts" – and the Eleventh Circuit appears to require quite a few – then there will be cases where the requirement will impose a burden

beyond that of providing "fair warning." Because "fair warning" is all that is required to overcome qualified immunity, the Court should hold that there is no requirement that the constitutional right at issue be clearly established by a prior case presenting "materially similar facts." Fair warning, not factual equivalency, should be the focus of the qualified immunity inquiry.

II. THE UNCONSTITUTIONALITY OF USING RESTRAINTS AS PUNISHMENT WAS CLEARLY ESTABLISHED WHEN THE PETITIONER WAS HANDCUFFED TO THE HITCHING POST

The hitching post was used in this case as "a form of corporal punishment."[10] Long before the petitioner was handcuffed to the post in an awkward position and left in the hot sun, it was clearly established that such a form of punishment was unconstitutional. The pillory – long regarded as a barbarous, unconstitutional device – was an obvious parallel. And the decision in *Gates v. Collier* – outlawing a practice indistinguishable from what occurred here – should have driven the point home to any reasonable corrections officer.

The Eighth Amendment prohibits punishments that involve "the unnecessary and wanton infliction of pain." *Wilson*, 501 U.S. at 297. In determining which punishments meet this standard, the Eighth Amendment draws its meaning from "the evolving standards of decency that

[10] *Austin*, 15 F. Supp. 2d at 1258-59; *accord Fountain v. Talley*, 104 F. Supp. 2d 1345, 1351 (M.D. Ala. 2000).

mark the progress of a maturing society." *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (citation omitted). The infliction of pain without "penological justification" is considered to be "unnecessary and wanton." *Id.* (citations omitted).

As the court below recognized, Hope demonstrated that his constitutional rights were violated by satisfying both the subjective and objective components of the Eighth Amendment inquiry. *See* Pet. App. 5 (citing *Wilson*, 501 U.S. at 300). Hope met the subjective test by showing that the respondents were aware that placing him on the hitching post created a substantial risk of harm, yet did nothing to abate that risk. *See* Pet. App. 6. Hope met the objective test by showing that he was denied basic human necessities while on the hitching post and was subjected to various risks of harm such as physical pain, dehydration, sunburn, injury to his wrists, and harassment. *Id.* at 8. The principal question at this point is whether Hope's Eighth Amendment right, not to be treated in this manner, was clearly established at the time.

Because our society eschewed barbarous punishments long ago, this Court's Eighth Amendment jurisprudence, outside of the capital context, has addressed prison conditions, not cruel punishments.[11] The fact that

[11] *See, e.g., Farmer v. Brennan*, 511 U.S. 825 (1994) (right to be protected from inmate violence); *Helling v. McKinney*, 509 U.S. 25 (1993) (right to be free from risks of harm from cigarette smoke); *Estelle v. Gamble*, 429 U.S. 97 (1976) (right to adequate medical care); *see also DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989) (prisoners have rights to adequate food, clothing, and shelter).

there is little case law addressing devices like the hitching post is not remarkable; the paucity of precedent on instruments that inflict corporal punishment is a direct reflection of their obvious unlawfulness. *See Trop v. Dulles*, 356 U.S. 86, 100 (1958) ("This Court has had little occasion to give precise content to the Eighth Amendment, and, in an enlightened democracy such as ours, this is not surprising."). The fact that there is no case law prohibiting the caning of inmates surely does not render the propriety of such a punishment an open question under the Eighth Amendment.[12]

The "primary concern of the drafters" of the Eighth Amendment was proscribing " 'barbarous' methods of punishment." *See Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (citation omitted); *see also id.* at 102-03 (discussing history of Eighth Amendment). In one of the few cases to address corporal punishment, the Court struck down a conviction in part because the sentence required the inmate to "always carry a chain at the ankle, hanging from the wrists . . . and [that he] be employed at hard and painful labor." *Weems v. United States*, 217 U.S. 349, 364 (1910). In its discussion of barbaric punishments, the Court noted that the "whipping post" was "certainly as odious as the pillory, and the latter has been pronounced to be within the prohibitory clause." *Id.* at 377-78; *see also Chandler v. Florida*, 449 U.S. 560, 580-81 (1981) (recognizing that "the public pillory [has been] long abandoned as a barbaric perversion of decent justice"). The fact that the comments

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[12] *Cf. Jackson v. Bishop*, 404 F.2d 571, 579-80 (8th Cir. 1968) (holding that use of a strap to whip inmates is unconstitutional corporal punishment).

about the pillory in *Weems* and *Chandler* are *dicta* simply reflects that the unconstitutionality of the punishment had long been settled, not that it is still up in the air.

The hitching post is a modern version of the pillory. Both devices require the victim to stand outdoors in an uncomfortable position with his or her wrists secured at chest-level for hours on end. *Compare* Black's Law Dictionary 1148 (6th ed. 1990) (defining pillory as "a frame erected on a pillar, and made with holes and movable boards, through which the heads and hands of criminals were put") *with* Pet. App. 6 (describing hitching post as a metal bar to which Hope was handcuffed "with his arms at approximately head level"). The pillory included an apparatus that held its victim's head in a fixed manner, and the hitching post did not. *See* Op. Cert. 16. But both devices were designed to inflict pain.

In *Austin v. Hopper*, the district court recognized that the hitching post was "a form of corporal punishment whose history can be traced to the pillory and the stocks." 15 F. Supp. 2d at 1259. The court below made a similar point: "Since abolishing the pillory over a century ago, our system of justice has consistently moved away from forms of punishment similar to hitching posts in prisons." Pet. App. 8. Given the obvious unconstitutionality of the pillory, the respondents should have known that using the hitching post as a form of punishment was unconstitutional as well. The fact that no other state used such a barbaric form of punishment, *see Austin*, 15 F. Supp. 2d at 1250, should have been another sign that it was unlawful. *Cf. Harmelin v. Michigan*, 501 U.S. 957, 976 (1991) (Eighth Amendment prohibits "cruel methods

of punishment that are not regularly and customarily employed").

Physical restraints may certainly be used in a non-punitive manner to quell a disturbance, to restore order in exigent circumstances, or to maintain security. *See, e.g., Whitley v. Albers*, 475 U.S. 312, 320-21 (1986) (physical force may be applied in a good faith effort to maintain or restore discipline in exigent circumstances). But, as the court below found, this was not such a case. *See* Pet. App. 9-10 ("[T]here is no evidence in the record that Hope posed a continuing threat to prison safety while being transported from the work site to the prison or once he arrived at the prison itself."). "Once the necessity for the application of force ceases, any continued use of harmful force can be a violation of the Eighth and Fourteenth Amendments." *Williams v. Burton*, 943 F.2d 1572, 1576 (11th Cir. 1991); *see also Ort v. White*, 813 F.2d 318, 325 (11th Cir. 1987) ("Prison officials step over the line of constitutionally permissible conduct if they use more force than is reasonably necessary in an existing situation or if they summarily and maliciously inflict harm in retaliation for past conduct.").[13]

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[13] The Court has recognized that the prolonged use of ordinary physical restraints like handcuffs and four-point restraints may be harmful and inflict unnecessary pain. *See Washington v. Harper*, 494 U.S. 210, 226-27 (1990) ("Physical restraints are effective only in the short term, and can have serious physical side effects when used on a resisting inmate."); *see also Williams v. Benjamin*, 77 F.3d 756, 764 (4th Cir. 1996) (use of four-point restraints "undoubtedly impose a significant threat of physical injury"); *Davidson v. Flynn*, 32 F.3d 27, 30 (2d Cir. 1994) (cuffing an inmate's hands and legs too tightly caused scars and prolonged numbness); *Ferola v. Moran*, 622 F. Supp. 814, 822 (D.R.I. 1985) ("Sheer common sense tells us that immobility in such a position for a protracted period of time will cause great physical suffering and the likelihood of injury."); *Landman v. Royster*, 333 F. Supp. 621, 647-48 (E.D. Va. 1971) (chaining and handcuffing inmate to cell can cause "permanent scars . . . and prolonged physical pain" amounting to "physical torture").

The case most directly on point here is *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974). In *Gates*, the former Fifth Circuit banned a form of punishment virtually identical to the hitching post. In a section of its opinion entitled "Corporal Punishment," the court of appeals found that "handcuffing inmates to the fence and to cells for long periods of time . . . and forcing inmates to stand, sit or lie on crates, stumps, or otherwise maintain awkward positions for prolonged periods" runs afoul of the Eighth Amendment. *Gates*, 501 F.2d at 1306.

There is one difference between this case and *Gates*: *Gates* prohibited handcuffing inmates to fences and cells; this case concerns handcuffing inmates to horizontal metal bars. But this difference is obviously insignificant, and the court below did not appear to think otherwise. It distinguished *Gates* not on the basis of any difference between being hitched to a fence and being hitched to a post, but rather on the basis that *Gates* involved many other forms of punishment as well.[14] To put it another

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[14] The court below stated that *Gates* was different because "it involved an effort to make substantial changes based on the unconstitutional 'conditions and practices in the maintenance, operation and administration' of a prison." Pet. App. 13 (citation omitted). The Magistrate Judge made the same point. *See* Supp. Pet. App. 22 (*Gates* "dealt with a variety of complaints about prison practices and conditions, corporal punishment among them.").

way, the problem for the court below was not that *Gates* failed to draw a bright line. It was that *Gates* drew *too many* bright lines.

But the fact that the prohibition in *Gates* was but one issue among many makes it no less controlling than if the case had concerned but a single claim. The court below did not find that *Gates'* prohibition against handcuffing inmates to fences in order to punish them was *dicta*. *See* Pet. App. 13. Nor did it find that the *Gates* holding on the point was vague or equivocal. *Id*. Indeed, *Gates* was quite unambiguous. *See Gates*, 501 F.2d at 1306 ("We have no difficulty in reaching the conclusion that these forms of corporal punishment run afoul of the Eighth Amendment."). If Gates were distinguishable on the basis that it involved multiple issues, then only cases deciding a single legal issue could ever clearly establish the law.

The decision in *Gates*, this Court's recognition of the unconstitutionality of the pillory, and the case law's prohibition against corporal punishment were not the only signposts that gave the respondents fair warning. The widespread understanding of the inappropriateness of using physical restraints to punish inmates is also reflected in the standards of the corrections profession. The American Correctional Association's STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS forbid the use of physical restraints as punishment, as do the American Bar Association's STANDARDS FOR CRIMINAL JUSTICE.[15] The Court has considered "the views

[15] *See Austin*, 15 F. Supp. 2d at 1260 n.220 (quoting American Correctional Association standard that "instruments of restraint such as handcuffs, irons, and straight jackets, are never applied as punishment" and that "[c]orporal punishment should never be used under any circumstances [including] such practices as . . . handcuffing to cell doors or posts, shackling so as to enforce cramped position or to cut off circulation, standing for excessive periods"); *id*. at 1260 n.221 (quoting American Bar Association standard that "[p]ersonal restraints like handcuffs, irons, and straitjackets are to be used only if necessary to prevent individual prisoners from escaping during transfers or injuring themselves or others").

that have been expressed by respected professional organizations" in determining whether a punishment offends civilized standards of decency. *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (noting the views of the American Bar Association and the American Law Institute). The Court has also found professional standards "instructive" in determining other constitutional questions involving the rights of prisoners. *See, e.g., Bell v. Wolfish*, 441 U.S. 520, 543 n.27 (1979) (considering standards of American Correctional Association).

In summary, no reasonable officer – especially one in a circuit that included *Gates* among its precedents – could have believed in 1995 that handcuffing an inmate to a post as a form of punishment was lawful. The officers here are not entitled to qualified immunity.

CONCLUSION

For all the above reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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